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No. 87-1651

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

COMMONWEALTH OF MASSACHUSETTS,

*Petitioner,*

v.

DOUGLAS L. OAKES,

*Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

## MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* AND BRIEF OF COVENANT HOUSE AND THE NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, *AMICI CURIAE*

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## MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE*

Covenant House and the National Center for Missing and Exploited Children hereby respectfully move for leave to file the attached brief *amici curiae* in support of the Commonwealth of Massachusetts in this case. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the Respondent was requested, but no response was received.

### Interest of *Amici*

Covenant House is a New York not-for-profit organization dedicated to providing crisis care and longer-term help to homeless and runaway children. With "open-intake" crisis centers located in New York, Houston, Fort Lauderdale,

New Orleans, and Toronto, Covenant House now serves over 20,000 such children annually in North America. (Since 1980 Covenant House has served abandoned and homeless children in Central America as well, with current programs in Guatemala, Panama, and Honduras.) Typically aged 12 to 20, most of these children have spent long stretches of their lives battling for survival on city streets, with prostitution, drugs, and petty crime dominating their lives, and often their souls. In the last two years Covenant House has launched a national toll-free hotline, the "NINELINE"—available to homeless, runaway, other troubled youth and their families—and several major outreach programs, using mobile vans and counsellors on foot, to seek out children living on the street.

Because of this close involvement with "street kids," Covenant House came early to the fight against child sexual exploitation, supporting legal action against juvenile prostitution and child pornography throughout the last fifteen years. Covenant House filed two briefs *amicus curiae* in *New York* v. *Ferber*, 458 U.S. 747 (1982), and founded the Institute for Youth Advocacy in that year, with one of its purposes being a continued struggle to protect children from sexual exploitation through every available legal means. The Institute played an important role in the drafting and passage of the Child Protection Act of 1984, 18 U.S.C. §§2251-2254, 2256, and the Child Abuse Victims Rights Act of 1986, 18 U.S.C. §2255, which together represent a powerful federal commitment to stop the traffic in child pornography. Covenant House continually seeks to educate the public about the dangers of all types of sexual abuse and exploitation of children, and more importantly, to care for those already so misused. Half or more of the children and teenagers who come to Covenant House programs each year have been sexually exploited at home or on the street prior to their arrival; most have little prospect of healthy futures without dramatic personal, educational, and economic intervention.



The National Center for Missing and Exploited Children (the "Center") is a nonprofit, tax-exempt corporation chartered in the District of Columbia in 1984, with the goals of decreasing the incidence of crimes against children, effecting positive changes in public law and policy and encouraging an awareness of the significance of all crimes against children, and assisting families and those who seek to protect children.

The Center has been funded by the Office of Juvenile Justice and Delinquency Prevention since 1984 to implement three tasks under the Missing Children's Assistance Act (Public Law 98-473; 42 U.S.C. §§5771-5777) to operate the national toll-free hotline for reports of missing children; to operate the national resource center and clearinghouse for prevention, investigation, prosecution, and treatment of the missing and exploited child case; and to assist OJJDP in performing its task of coordinating federally funded programs relating to missing children. The Center actively assists federal and state law enforcement agencies' efforts to reduce the incidence of sexual exploitation, including passing reports of child pornography received on the hotline to agents of the U.S. Customs Service and local police departments for investigation. The Center provides information on specific federal and state statutes and legislation affecting children, including child pornography laws, to 39 state missing children clearinghouses, 130 nonprofit organizations, and interested child advocates, and training to professionals on investigation and prosecution of child pornography.

The Center has disseminated more than 1.7 million free copies of the eight books and 11 brochures it has developed, including four specifically devoted to child sexual victimization: *Child Pornography and Prostitution: Background and Legal Analysis* (produced in cooperation with Covenant House, among others), *Children Traumatized in Sex Rings*, *Interviewing Child Victims of Sexual Molestation*, and *Child Molesters: A Behavioral Analysis*. The Center's

*Selected State Legislation* identifies model legislation related to children, including laws against sexual exploitation.

Because of their strong, and complementary, commitments to protecting children, Covenant House and the Center may provide perspectives on the issues in this case that the parties—prosecution and defense alike—cannot. Both organizations take as the starting point of their analysis of the issues here not the desirability of punishing a specific offender, but the interests and the vulnerability of thousands of children. Protecting those children in all of the fifty states will depend, in part, on maintaining clarity and common sense in First Amendment analysis of child pornography statutes. Covenant House and the Center therefore respectfully ask that their views be heard in the case, but more importantly that the muddled decision of the Massachusetts Supreme Judicial Court be reversed.

Respectfully submitted,

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*for Movants/Amici Curiae*



## Question Presented

Is a state statute "overbroad", and void on its face under the First Amendment, if it prohibits the solicitation of children to "pose" or be "exhibited" in a state of nudity for a photograph, when such prohibition is part of a general statutory scheme to ban the production of child pornography, and when the highest state court failed to explain why no narrowing construction of the statute is possible?

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## BRIEF *AMICI CURIAE*

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### Statement of Interest

As more fully explained in the accompanying motion, Covenant House and the National Center for Missing and Exploited Children are non-profit organizations with deep commitments to protecting children from sexual exploitation and abuse.

### Summary of Argument

In enacting Section 29A of Mass. Gen. Laws Ann. ch. 272 (West Supp. 1988) [Section 29A], the Massachusetts legislature made a strong governmental commitment to protect children from being solicited to participate in sexually exploitative photographs and motion pictures. The focus

of the law, on the *production* of child pornography, falls in an area where First Amendment protection was deemed virtually out of the question by both the parties and this Court in *New York* v. *Ferber,* 458 U.S. 747, 762 (1982).

Despite *Ferber,* the Supreme Judicial Court of Massachusetts found Section 29A violative of the First Amendment as overbroad and declared it void on its face—all because of one phrase, a prohibition against soliciting children for poses or exhibition in a "state of nudity." The lower court majority failed to take stock of the general threat to children which Section 29A was designed to meet; nor did it appear to understand that requests of children to pose for "merely" nude photographs are typically part of a process of seduction or coercion into sexual abuse by an adult. Because Section 29A protects crucial privacy interests of children and is aimed at harmful, nonexpressive conduct, it impacts no significant First Amendment interests. Adding some kind of "lewdness" qualification to the "state of nudity" language would, moreover, only create hopeless conceptual and evidentiary anomalies in the statute.

Even if the lower court's 4 to 3 majority were correct about some marginal effect on First Amendment interests, however, its use of "overbreadth" doctrine could not be countenanced. The decision below facially invalidates an entire statute without any showing that its purported overbreadth is in any sense substantial compared with the law's broadly legitimate scope. Further, the lower court failed to explain, as the decisions of this Court require, why some limiting construction of the challenged act is not possible under state law. For all these reasons, the decision below should be reversed.



## Introduction

I never witness a performance of child-acrobats, or the exhibition of any forced talent, physical or mental, on the part of children, without protesting . . . against the blindness and cruelty of their parents or guardians, or whoever has the care of them.

I saw at the theatre, the other night, two tiny girls, mere babies they were, doing such feats upon a bar of wood suspended from the ceiling, as made my blood run cold. They were twin sisters, these mites, with that old young look on their faces which all such unfortunates have. I hardly dared glance at them, up there in the air, hanging by their feet from the swinging bar, twisting their fragile spines and distorting their poor little bodies, when they ought to have been nestled in soft blankets in a cozy chamber. . . .

There is a noble "Society for the Prevention of Cruelty to Dumb Animals." There ought to be a Society for the Prevention of Cruelty to Little Children.[1]

—Thomas Aldrich, *The Little Violinist* (1877)

For over a century Massachusetts citizens like Thomas Aldrich have sought to protect children from becoming the hapless, exploited instruments of their elders' "speech." Thus tight restrictions were imposed on the use of child performers in theatrical exhibitions in any way that might jeopardize their schooling or health.[2] Outright prohibitions

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[1] *Quoted in* 2 *Children and Youth in America: A Documentary History* 203 (R. Bremner ed. 1971). Aldrich got at least part of his wish in 1878, with the founding of the Massachusetts Society for the Prevention of Cruelty to Children, who, it should be noted, have also filed a brief *amicus curiae* in support of the Commonwealth.

[2] The current version of those restrictions is included in Mass. Gen. Laws Ann. ch. 149, §60 (West 1982). For an early example of their enforcement see *Commonwealth* v. *Griffith,* 90 N.E. 394 (Mass. 1910).

were enacted, and eventually upheld by this Court, *Prince* v. *Massachusetts*, 321 U.S. 158 (1944), against the use of children to distribute newspapers and periodicals on the street. Similar laws are common in other states,[3] and are echoed in federal statutes.[4] They are part, of course, of more general statutory schemes to protect children from abuse and exploitation, even when, as in emotional abuse cases, the "speech" of their parents may thereby be restrained.[5]

None of these advocates a century ago, nor indeed as recently as the early 1970's,[6] imagined that despite all their efforts children and teenagers would in our time become the sexual coin of a flourishing child pornography industry—"performers" in a setting more depraved than any cheap circus or music hall. They would have applauded, though, the swift response of the Massachusetts legislature as soon as the existence of the industry became public knowledge. That response, embodied in Mass. Gen. Laws Ann. ch. 272, §29A (West Supp. 1988) ["Section 29A"],[7]

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[3] *See, e.g.*, Cal. Lab. Code §§1308.5, 1394.5, 1396 (Deering 1976), and N.Y. Arts & Cult. Aff. Law §35.01 (McKinney 1984), regulating, and in some cases forbidding, the use of child performers; and Cal. Lab. Code §1298 (Deering 1976) and N.Y. Educ. Law §3227 (McKinney 1981), restricting the use of children in newspaper distribution.

[4] *See* 29 U.S.C. §212 (1982), applied to magazine distribution by children in *Wirtz* v. *Keystone Readers Service, Inc.*, 282 F. Supp. 871 (S.D.Fla. 1968). *But see* 29 U.S.C. §213(c)(3) (1982), exempting theatrical productions and other entertainment from the federal child-labor provisions.

[5] *See* 42 U.S.C. §§5101-5102 (Supp. IV 1986); Mass. Gen. Laws Ann. ch. 119, §§51A-51G (West Supp. 1988).

[6] Thus the *Report of the Commission on Obscenity and Pornography* (1970) failed even to mention the existence or possibility of child pornography. *See* 1 *Attorney General's Commission on Pornography: Final Report* 595 (1986) [hereinafter "Attorney General's Report"].

[7] 1982 Mass. Acts ch. 364. The original version of Section 29A was adopted in 1977 Mass. Acts ch. 917, §1, with virtually identical language.



was straightforward and direct, forbidding adults from inducing, employing or causing minors to "pose or be exhibited in a state of nudity or to participate or engage . . . in sexual conduct for purpose of visual representation or reproduction. . . ." *Id.*[8]

Only six years ago this Court seemed to ensure that child pornography statutes would be accorded some "leeway" in meeting "overbreadth" challenges under the First Amendment. *New York* v. *Ferber*, 458 U.S. 747, 756 (1982); *id.* at 776 (Brennan, J., concurring). Recognizing, like Congress,[9] that such sexual exploitation "has become a serious national problem," *id.* at 749, the Court held its suppression to be "a government objective of surpassing importance," *id.* at 757, an objective justifying the exclusion of child pornography from "speech" protected by the First Amendment. *Id.* at 766. Even the possibility that some protected materials—especially those possessing "serious literary, scientific or educational value"—might technically fall within the language of the New York statute could not justify invalidation of a statute "whose legitimate reach dwarfs its arguably impermissible applications." *Id.* at 773, 776 (Brennan, J., concurring).

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[8] A companion statute banning the *distribution* of child pornography, Mass. Gen. Laws Ann. ch. 272, §29B (West Supp. 1987), is not at issue here.

[9] In enacting the Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204-205 (codified at 18 U.S.C. §§2251-2254, 2256 (Supp. IV 1986), Congress made the following findings: "(1) child pornography has developed into a highly organized, multi-million-dollar industry which operates on a national scale; (2) thousands of children including large numbers of runaway and homeless youth are exploited in the production and distribution of pornographic materials; and (3) the use of children as subjects of pornographic material is harmful to the physiological, emotional and mental health of the individual child and to society." Congress first acted against the production of child pornography in 1978, with passage of the Protection of Children Against Sexual Exploitation Act, Pub. L. No. 95-225, §1, 92 Stat. 7.

Section 29A, enacted in its present form three weeks after the Court decided *Ferber*,[10] has now become the victim of precisely the kind of First Amendment/Overbreadth analysis the *Ferber* Court unanimously rejected. The Supreme Judicial Court of Massachusetts, on a 4 to 3 vote, has invalidated Section 29A in a cryptic opinion, 401 Mass. 602, 518 N.E.2d 836 (1988) that may be read one of two ways. First, the court may be seen as adhering to an absolutist concept that the First Amendment protects all activity intended to be recorded on film, despite the clearest teachings of *Ferber* and other decisions to the contrary. Or, more charitably, the court may be viewed as having rejected Section 29A because it failed to follow with exact precision the New York statute approved in *Ferber*—substituting the phrase "state of nudity" for "lewd exhibition of the genitals". *See Ferber,* 458 U.S. at 765. For whichever of these reasons, or perhaps for both, the court declared Section 29A "overbroad" under the First Amendment and invalidated it in its entirety. 401 Mass. at 605, 518 N.E.2d at 838.

Unhappily, even the most charitable reading of the Supreme Judicial Court's majority opinion will not salvage its analysis. Most fundamentally, it ignores the crucial interests of children that every word of Section 29A, even on its broadest interpretation, seeks to protect. Perhaps for that reason the lower court failed to appreciate a vital difference between this statute and the one upheld in *Ferber:* Section 29A is aimed *directly* at the underlying sexual abuse of children in the creation of child pornography rather than at a tangible, arguably "expressive" product of that abuse. As such its relationship to First Amendment concerns is substantially different from the New York statute, and substantially less troubling. Finally, though, the lower court simply misunderstood and misapplied the First Amendment "overbreadth" principles developed in *Broadrick* v. *Oklahoma,* 413 U.S. 601 (1973), *Ferber,* and later decisions of this Court. Because this lapse of judgment jeopardizes the emotional and mental health of thousands of children, the lower court's opinion should be disowned by the Court finally entrusted with preserving the integrity, and the dignity, of the First Amendment.

[10] The law was approved on July 20, 1982. 1982 Mass. Acts ch. 365.



## I.

## The Challenged Statute Directly Addresses the Transcendent State Interest in Protecting the Privacy and Health of Children.

There is likely to be little dispute in this case concerning the general proposition that recently attracted "consensus" support among social scientists: "Children and adolescents who participate in the production of pornography experience adverse, enduring effects."[11] Because the lower court so completely ignored the extent and the nature of those harms in its opinion, however, and because it has been six years since a case of this type has reached this Court, it is worthwhile to review briefly the nature of the child pornography problem at which Section 29A is directed. As a subset of that problem it is then possible to identify the specific health and privacy concerns addressed by the portion of Section 29A—covering solicitation of children to pose in a "state of nudity"—found offensive by the lower court.

### A. *Exploitation of Children in Pornography Remains an Extremely Serious National Problem.*

When the issue of child pornography swept over public consciousness in the late 1970's, evidence of its extent was

[11] E. Mulvey & J. Haugaard, *Report of the Surgeon General's Workshop on Pornography and Public Health* 13 (1986). *Accord, Attorney General's Report, supra* note 6, at 405-418, 595-614.

almost entirely anecdotal.[12] Now it is possible to state the magnitude of such exploitation with some greater degree of certainty. Thus one prominent scholar in the area of child sexual abuse found that 11 percent of the subjects in a carefully conducted random survey of women had been asked to pose for pornography prior to age eighteen.[13] Fifteen percent of runaways in a sample from the juvenile justice system were found to have been involved in pornography.[14] Most tellingly of all, perhaps, a sophisticated general survey of Canadians revealed that "over 60,000 Canadians, when they were children, may have been the subject of sexually explicit depictions." [15]

The dark consequences of that abuse have become clearer as well. Confirming earlier clinical studies relied on by the Court in *Ferber,* 458 U.S. 758n.9, later research has shown that children used in pornography experience a wide range of damaging physical and psychological effects that linger long after the sexual abuse itself has stopped.[16] Par-

[12] *See, e.g., Sexual Exploitation of Children, Hearings Before the Sub-Committee on Crime of the House Committee on the Judiciary,* 95th Cong., 1st Sess. (1977); *Texas House Select Committee on Child Pornography, Its Related Causes and Control* (1978).

[13] D. Russell, *The Secret Trauma: Incest in the Lives of Girls and Women* 162 (1986).

[14] Rabun, *Combating Child Pornography and Prostitution: One County's Approach,* in *Child Pornography and Sex Rings* 187, 196 (A. Burgess ed. 1984).

[15] 2 *Sexual Offenses Against Children: Report of the Comm. on Sexual Offenses Against Children and Youths Appointed by the Minister of Justice and Attorney General of Canada* 1198 (1984) [hereinafter "Canadian Report"].

[16] Burgess, *et al., Impact of Child Pornography and Sex Rings on Child Victims and Their Families,* in *Child Pornography and Sex Rings, supra* note 14, at 111-126 [hereinafter "Impact of Child Pornography"]; Burgess, *et al., Response Patterns in Children and Adolescents Exploited Through Sex Rings and Pornography,* 141 Am.J.Psychiatry 656, 658-659 (1984) [hereinafter "Response Patterns"]. *See also,* Mulvey & Haugaard, *supra* note 11, 13-16; Schoettle, *Child Exploitation: A Study of Child Pornography,* 19 J. Am. Acad. Child Psychiatry 289 (1980).



ticularly associated with involvement in pornography, as compared with other types of sexual abuse, is identification of the victimized child with the exploiting adult, sometimes leading the abused child himself to abuse other children.[17]

We know more, too, regarding the techniques used by adults to induce children to allow themselves to be filmed in pornography. Such adults are extremely skilled at using a combination of coercion, seduction, blackmail, and peer pressure to obtain children for pornography.[18] The "consent" of a child in this context is thus an empty concept,[19] and at no point does the opinion of the court below more closely approach the vacuous than in describing as "consenting" a young girl posing nude for her stepfather.[20] 518 N.E.2d at 837. *See id.* at 838 (O'Connor, J., dissenting). Sexual abuse of minors occurs overwhelmingly in contexts where the abuser is in a position of power or trust.[21]

[17] *Response Patterns, supra* note 16, at 661; *Impact of Child Pornography, supra* note 16, at 116-117.

[18] *Belanger, et al., Typology of Sex Rings Exploiting Children,* in *Child Pornography and Sex Rings, supra* note 14, at 51, 52-54; S. Goldstein, *The Sexual Exploitation of Children* 92 (1987); *Attorney General's Report, supra* note 6, at 406-410, 609-611.

[19] *See* Russell, *supra* note 13, at 55 (". . . consent by children to sexual encounters with persons older than themselves cannot be seen as indicative of the child's desires."); Finkelhor, *What's Wrong With Sex Between Adults and Children,* 49 Am.J.Orthopsychiatry 692, 694-695 (1979); Rosenfeld, *Treating Victims of Incest,* 8 Br.J.Sexual Med. 5, 10 (1981).

[20] This is especially so because girls are at especially high risk of sexual abuse, and of sexual abuse "at the most serious level of violation," by stepfathers. Russell, *The Prevalence and Seriousness of Incestuous Abuse: Stepfathers vs. Biological Fathers,* 8 Child Abuse & Neglect 15, 20 (1984). *Accord,* Parker & Parker, *Father-Daughter Sexual Abuse: An Emerging Perspective.* 56 Am.J. Orthopsychiatry 531, 533 (1986).

[21] D. Finkelhor, *Sexually Victimized Children* 55-57, 73-75 (1979); R. Geiser, *Hidden Victims: The Sexual Abuse of Children* 159 (1979). This is especially true of child pornography offenders. Belanger, *supra* note 18, at 52.

**B. *The State Has a Compelling Interest in Preventing the Solicitation of Children to Appear in Nude Photographs.***

If recent research has confirmed the legitimacy of previous outrage over child pornography, it has clarified as well the overall relationship between sexually invasive photography of children and sexual abuse. No fair assessment of that research can suggest any but the highest level of concern for the safety of children who are induced, seduced, or coerced to pose for nude photographs—whether or not the resulting pictures meet legal standards of "lewdness" or "obscenity."

It is important to recognize, first, that nudity is no casual matter for any but the youngest children. Thus school-age children "develop a sense of privacy about their bodies and . . . are uncomfortable with nudity, either on the parent's part or their own part," a sense which "should not be violated." [22] This appears to be particularly true for adolescents, who strongly need physical privacy from parents and others for healthy sexual and emotional development.[23] While the literature on this point is not conclusive, it does seem clear that the harmlessness of "mere"

[22] B. Justice & R. Justice, *The Broken Taboo: Sex in the Family* 215 (1979). *See* Finkelhor, *Psychological, Cultural and Family Factors in Incest and Family Sexual Abuse*, 4 J. Marriage & Family Counselling 41, 47 (1978) (describing "sexualized" families, in which dressing must take place in public, with no "respect of privacy", as at high risk for sexual abuse); Rosenfeld, *et al.*, *Familial Bathing Patterns: Implications for Cases of Alleged Molestation and for Pediatric Practice*, 79 Pediatrics 224, 228 (1987) (co-bathing of children older than 9 years with opposite-sex parent "suggestive" of sexual abuse).

[23] D. Miller, *Adolescence: Psychology, Psychopathology, and Psychotherapy* 28-29 (1974). Part of this need is no doubt due to the emotional turmoil every adolescent suffers over the rapid changes in his/her body. Schonfeld, *Adolescent Development: Determinants*, in 1 *Adolescent Psychiatry* 314, 315-319 (1971).



nudity for children is hardly something to be taken for granted.[24]

When nudity is connected to photography, however, a much clearer, much more chilling pattern emerges. For the inducement of children to pose in various stages of undress for photographs is intimately, overwhelmingly tied to the process of sexual abuse. One expert in law enforcement put it thus:

> . . . *if photos of naked children are taken, there is a great probability that the child has been molested before, during, or after the taking of the picture.* Therefore, if an investigation reveals photos of naked children, the investigator should strongly suspect that the children depicted have been abused, are in further danger, and *are in need of immediate protection.*[25]

A special Canadian commission on child sexual abuse found nude photography of children to be strongly associated both with their sexual abuse and with later involvement in more sexually explicit photographs.[26] In one earlier Massachusetts case, 63 youths who had been induced to appear in nude photographs were found to have been prostituted and sexually abused by several older men

[24] It is thus no surprise that the court below referred only to nudity of a "one-year-old" as an example of obviously harmless conduct reached by Section 29A. 518 N.E.2d at 838. Surely no naked 15-year-old could go "running on a beach or romping in a wading pool" without severe trauma, certainly not in the presence of a photographer.

[25] Goldstein, *supra* note 18, at 129 (emphasis in original).

[26] *Canadian Report*, *supra* note 15, at 1199, 1201, 1209. *See also*, Belanger, *supra* note 18, at 53 ("Initiation into the sexual activity [of a child sex ring] usually begins with indirect approaches . . . to pressure the children to exhibit themselves"); Finkelhor, *supra* note 21, at 76 (describing sex abuser as wanting "to photograph the naked child or expose himself to the child, for the child's horrified reaction").

acting in concert.[27] "Merely" nude photographs will serve perfectly well to blackmail sexually abused children into silence.[28]

It is thus possible to say three important things about the judgment below even before undertaking analysis of its soundness in legal doctrine. First, it appears largely to ignore the general threat posed by the use of children in pornography, both to their welfare and to the State's *parens patriae* interests. Second, it uses what turns out to be a very special exception—the naked one-year-old running on the beach, 518 N.E.2d at 838—to trivialize the very real physical privacy concerns of all but the youngest children. Finally, though, it is innocent of any understanding that the enticement of children into nude photography is virtually the exclusive province of certain perpetrators of sexual abuse—with the blackmail potential of such photographs making escape from molestation far more difficult. Even without an understanding of these facts the court below should have reached a different result, but with this background the First Amendment issues become that much easier to resolve.[29]

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[27] Belanger, *supra* note 18, at 62-63.

[28] Goldstein, *supra* note 18, at 127 ("Photographs, regardless of the innocent nature of their content, are also used as blackmail to keep the child quiet.")

[29] Thus the *Ferber* Court apparently found it less problematic to uphold the state statute at issue on doctrinal grounds after carefully considering the empirical and clinical evidence offered in its defense. 458 U.S. at 758-762.



## II.

### None of the Conduct Proscribed by the Statute at Issue Is Protected by the First Amendment.

It may well be that the lower court would have struck a different balance in its "overbreadth" analysis if it had properly appreciated the full scope of the threat to children posed even by their enticement to appear in "merely" nude photographs. Yet a more fundamental question looms first: is such conduct covered by the First Amendment at all? The court below declared that "[s]urely the First Amendment protects" the taking by a parent of "a frontal view picture of his or her one-year-old running on a beach," or the use of "child models" by the "artists who painted some of the world's greatest paintings." 518 N.E. 2d at 838. For a number of reasons *Amici* are not at all sure of that proposition.

Before outlining those reasons, however, it is worth noting an extremely important fact about *Ferber:* it was a case focusing on the First Amendment status of materials already in existence. That is not to say it concerned "speech" as opposed to "conduct," a distinction *Amici* believe to be only of limited value.[30] Rather, the crucial difficulty for the Court in *Ferber* was that it was being asked to allow the State to attack an underlying evil—sexual abuse of children in the making of pornography—by banning expression at one level removed from it, that is, at the distribution phase.[31] Thus the Court had no occasion

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[30] *See* Henkin, *The Supreme Court, 1967 Term—Foreword: On Drawing Lines,* 82 Harv. L. Rev. 63, 79 (1968). *But see, Payne* v. *Commonwealth,* 623 S.E.2d 867, 871-872 (Ky. 1981), *cert. denied,* 456 U.S. 909 (1982) ("use" of children in sexual photographs "less favored" under First Amendment than distribution of photos).

[31] The Court did recognize, of course, that distribution of child pornography inflicts additional injury on children used in production, 458 U.S. at 759, but chiefly emphasized the need to stop distribution as a means to discourage production. *Id.* at 758-761.

to consider the limits of State power in confronting production of such materials directly; it had only to note such power exists. 458 U.S. at 758, 762. The guidelines laid out by *Ferber* for assessing state child pornography statutes, *id.* at 764-766, thus by their terms applied only to bans on *distribution.* With respect to bans on production of explicit sexual materials using children, which attack offensive behavior directly rather than through the strategic suppression of expressive materials resulting from it, *Ferber* itself stands as no obstacle to according the States far greater discretion.[32]

Even as Section 29A attacks sexual exploitation head-on, moreover, it contains an important provision that moots the most troubling question presented by *Ferber:* whether defined materials with scientific, educational or literary value should receive First Amendment protection. *Compare id.* at 774-775 (O'Connor, J., concurring), *with id.* at 775-777 (Brennan, J., concurring in the judgment). An affirmative defense is afforded for production undertaken "for a bona fide scientific or medical purpose, or for an educational or cultural purpose for a bona fide school, museum or library." §29A. Absent an extremely narrow construction of this defense,[33] the statute seems in this

[32] One obvious difference between distribution and production bans, for example, was explored by Justice Stevens in his *Ferber* concurrence: the former inevitably affect materials produced outside the jurisdiction and perhaps even before the law became effective, while the latter chills only local, prospective conduct. *See id.* at 779.

[33] The court below avoided any mention of this affirmative defense, and failed to consider its effect on the statute's overall validity. Certainly reputable authors and artists have schools, libraries, and museums in mind when they prepare their works, so it is difficult to see how any works of "value" will be suppressed by Section 29A. *Amici* note, however, that "value" to viewers often will mean no less harm to the children depicted, *Ferber,* 458 U.S. at 774-775 (O'Connor, J., concurring); thus this affirmative defense is troublesome as a matter of policy.



respect far more limited in scope than the one upheld in *Ferber.*

*Ferber,* then, is not dispositive of this case, but its complex analysis tips, if anything, on the side of the State. That seems especially so if the following First Amendment considerations are taken into account: (1) the statute is a paradigmatic effort to protect crucial privacy rights of young citizens unable to protect themselves; (2) no recognizable interests in "expression" distinguish the conduct proscribed under Section 29A from that which is plainly within the State's power to ban; and (3) the "lewdness" of a nude picture is unknowable and irrelevant prior to its taking. Each of these propositions separately, and most certainly the three of them taken together, strongly argue against giving First Amendment refuge to any of the conduct described in Section 29A.

### A. *Section 29A Is a Direct, Wholly Permissible Effort by the State to Protect the Privacy Rights of Children.*

Since *Ferber,* and partially because of it, First Amendment cases and commentaries have begun to take serious account of what Professor Tribe has called the "individual's right to retain control over personal information."[34] *Ferber,* of course, denied protection to child pornography in part because of "the force of the privacy interests" of child performers violated by its distribution. 458 U.S. at 759n.10. Just this last term the Court denied First Amendment protection to a student newspaper "not sufficiently sensitive to the privacy interests" of pregnant girls, their boyfriends and their families. *Hazelwood School District* v. *Kuhlmeier,* —— U.S. ——, ——, 108 S.Ct. 562, 571, 98 L.Ed.2d 592, 607 (1988). The First Amendment must, ultimately, be harmonized with "the individual interest in

[34] *American Constitutional Law* 889 (2d ed. 1988). *See* Hill, *Defamation and Privacy under the First Amendment,* 76 Colum. L. Rev. 1205, 1253-1291 (1976).

avoiding disclosure of personal matters." *Whalen* v. *Roe,* 429 U.S. 589, 599 (1977). *See Globe Newspaper Co.* v. *Superior Court,* 457 U.S. 596, 607 (1982).[35]

Nudity, even without sexual conduct, is a "highly private" fact. *Wood* v. *Hustler Magazine, Inc.,* 736 F.2d 1084, 1093 (5th Cir. 1984), *cert. denied,* 469 U.S. 1107 (1985); *York* v. *Story,* 324 F.2d 450, 455 (9th Cir. 1963), *cert. denied,* 376 U.S. 939 (1964). That is especially so, as discussed above,[36] for children and teenagers, who are puzzled by, and often ashamed of, their rapidly changing bodies. They are, moreover, ill-equipped to decide when to waive these privacy rights, for once forfeited they cannot easily be recovered, *see Shields* v. *Gross,* 58 N.Y.2d 338, 448 N.E.2d 108 (1983), and decisions even by family members to permit or persuade a child to be photographed in the nude are all too often made with ulterior motives of child seduction.[37]

Section 29A, in short, seeks merely to protect vital privacy interests of children until they reach the age of majority and can make such decisions for themselves. Because of the especially intrusive character of nude photography and its integral connection to sexual abuse, the statute's scope—which excludes, again, works of some scientific, educational or cultural value—precisely matches the important interests at stake. More importantly, it is a far more direct vindication of children's privacy rights than are bans on distribution: (1) the actual filming is of course more intrusive than subsequent viewings of which

[35] *Globe Newspaper,* it should be noted, involved the First Amendment rights of the press and the public to attend criminal trials, a societal interest of the highest importance. Even in the face of that interest, however, the Court recognized the legitimacy of closing courtrooms on a case-by-case basis to accommodate the "compelling" privacy interests of juvenile rape victims. 457 U.S. at 607-608.

[36] *See* text to notes 22-23, *supra.*

[37] *See* text to notes 25-28, *supra.*



a child may be completely ignorant; and (2) given the easily replicable nature of photography, it is extremely difficult to stop the disclosure and circulation of child pornography once made. In sum, the conduct described by Section 29A, even if properly characterized as expression, is "speech" which "by [its] very utterance inflicts injury." *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 571-572 (1942).

### B. *Section 29A Attacks No Conduct That Can Properly Be Labelled "Speech" Under the First Amendment.*

But *is* the solicitation of children to pose naked in front of a camera "speech" in any meaningful constitutional sense? Perhaps that question is best approached by contrasting the lower court's "speech" paradigm—parents filming a naked one-year-old—with a slightly different one: a nonfamily guest who sneaks into the bathroom to snap nude photographs of a 15-year-old.

Clearly no First Amendment protection for photography will protect the prying visitor.[38] But what distinguishes the two cases, other than the age of the photographed child and the family relationship of the photographer? Yet neither distinction has anything to do with any theory of the First Amendment or any defensible definition of "speech".[39] We might posit some theory of family "privacy" to distinguish the two situations, but it would be

[38] *See Hill, supra* note 34, at 1290.

[39] *See, e.g.,* Tribe, *supra* note 34, at 837 ("It is not plausible to uphold the right to use words as projectiles where no exchange of views is involved."); Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language,* 67 Georgetown L.J. 899 [First Amendment encompasses "intellectual (and perhaps public) communication and not self-expression" *id.* at 932]. If, to vary the scenario, the visitor took photos of the 15-year-old romping, like the lower court's treasured toddler, naked on a public beach, *he* perhaps could not be subject to penalty but of course the teenager could, for indecent exposure.

a principle resting on quite different values from "freedom of speech".[40]

What is missing from *both* these fact patterns, of course, is the individual, informed consent of the photographed child. Because it is the *subject's* body that is the "content" of the photograph, its making should only be treated as protected "speech" if such consent has been obtained. Thus "[w]ithout question a state may prohibit fraud, trickery, or the use of force to induce people to perform—in pornographic films or in any other films." *American Booksellers Ass'n* v. *Hudnut,* 771 F.2d 323, 332 (7th Cir. 1985), *summarily aff'd,* 475 U.S. 1001 (1986).[41] Children are not unique in being exploited in pornography,[42] but because they are "not possessed of that full capacity for individual choice which is the pre-supposition of First Amendment guarantees," *Ginsberg* v. *New York,* 390 U.S. 629, 649-650 (1968) (Stewart, J., concurring), the State may take special pains to protect them.

Through Section 29A, Massachusetts does not permit minors to give "consent" to posing for nude photographs, except those with some serious public value. Given the special privacy interests at stake, the connection of such conduct to sexual abuse, and the State's undoubted right to protect minors from sexual involvement, *see Michael M.* v. *Superior Ct. of Sonoma Co.,* 450 U.S. 464, 472n.8 (1981)

[40] Such a theory would also run squarely into *Prince* v. *Massachusetts,* 321 U.S. 158 (1944), where the Court specifically rejected the special "claim of parental right" with which a mother attempted to bolster her larger First Amendment claim to express herself through her daughter. *Id.* at 164, 170.

[41] *See* Tribe, *supra* note 34, at 915 n.71. *See also Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495, 502-503 (1952) ("Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problem.")

[42] For an overview of the sad plight of many adults in the commercial pornography industry, see *Attorney General's Report, supra* note 6, at 837-900.



and *id.* at 497 (Stevens, J., concurring), that legislative judgment seems defensible and constitutional. Once such consent is unavailable, though, the First Amendment seems utterly inapplicable to the process of inducing a child to pose naked before a camera. Obviously, in this context as in *Ferber,* photographers have the option of using older-but-appearing-younger models, 458 U.S. at 762-763. And as in *Ferber,* there is no "question here of censoring a particular literary theme or portrayal of sexual activity." 458 U.S. 763. First Amendment interests are simply not involved—or are involved at a level much less troublesome than they were in *Prince* v. *Massachusetts,* 321 U.S. 158 (1944), where another Massachusetts citizen was not permitted to use her child in exercising her own First Amendment rights,[43] or in *Clark* v. *Community for Creative Non-violence,* 468 U.S. 288 (1984), where the "conduct" (sleeping in the park) was far less dangerous and the intended message overtly political.

### C. *A Requirement of "Lewdness" as Part of the Definition of Soliciting Children for Pornography Is Fundamentally Illogical.*

The irrelevance of First Amendment doctrine to the conduct described by Section 29A becomes even plainer if the view of the lower court is simply carried to its logical end—*i.e.,* by looking at what the statute would look like if the "state of nudity" it describes were limited to "lewd" portrayals. Unless the lower court simply meant to disregard *Ferber,* that is the only possible distinction between the definitions of covered materials in the Massachusetts and New York statutes.

[43] Although the Court in *Prince* admonished Mrs. Prince severely that she might not "make martyrs of [her] children", 321 U.S. at 170, the record of the case provided no support for injury to the child even remotely comparable to that threatened by participation in even the mildest forms of child pornography. *See id.* at 174-175 (Murphy, J., dissenting).

What, then, is the result if only solicitation for "lewd" photographs involving nudity is covered? In two words, conceptual chaos. For the culpability of a given defendant in procuring a child for a nude photograph will be indeterminate until after a "lewd" photograph is actually taken. That is, the judgment of whether a given depiction is "lewd" simply cannot be made until the depiction itself exists, and it will depend on the reaction of others, a reaction unknowable at the time of soliciting the child. If someone other than the procurer takes the photograph, such "lewdness" will be in the hands of a person entirely different from the procurer. Thus, with reference to the lower court's putative toddler, a mother who sent the child out to the beach naked could find her fate hinging on which camera angle her husband chose to use.

Pedophiles, of course, do not declare to children in advance that the photographs they want to take are "lewd" or "lascivious" or "for the purpose of sexual stimulation." Placing such limitations on solicitation offenses in this context will only mean that law enforcement is helpless to act until a child has actually been sexually exploited. By asking a child to undress in front of a camera—to shed his privacy and become desperately vulnerable to abuse and blackmail—an adult has done quite enough to justify intervention by the State.

That this is the only plausible reading of *Ferber* is demonstrated by examining another prong of the formula it established for distribution statutes. Citing *Smith* v. *California,* 361 U.S. 147 (1959), and *Hamling* v. *United States,* 418 U.S. 87 (1974), the Court noted that: "As with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant." 458 U.S. at 765. But *Smith* and *Hamling* require a showing that defendants "knew the character and nature of the materials" at issue. *Hamling,* 418 U.S. at 123. Those whose participation in child sex rings comes *prior* to creation of the pornography could never be shown to have such



knowledge in advance. Thus it seems clear that "scienter" at a production phase of child pornography must be different from that during distribution, and that the *Ferber* Court never intended to impose the "lewdness" straightjacket on prohibitions against the exploitive acts underlying what eventually becomes "child pornography".[44]

## III.

### Even If a Fraction of the Conduct Described in the Statute at Issue Is Protected by the First Amendment, the Statute Is Not Unconstitutionally Overbroad.

Because Section 29A, while inartfully drafted,[45] nevertheless offends no discernable First Amendment interests, it hardly seems to require scrutiny for "overbreadth," a mode of analysis that is to be used "sparingly and only as a last resort." *Broadrick* v. *Oklahoma,* 413 U.S. 601, 613 (1973). Even if the lower court were correct in spotting some fleeting conflicts between the law and protected activity, it failed utterly to perform two crucial tasks prior to its constitutional *coup de grace.* First, it neglected to consider carefully whether those conflicts are truly "substantial"; second, it avoided facing up to the possibility of a narrowing construction of the statute. As both of these steps are integral parts of "overbreadth" analysis, the lower court's judgment is hopelessly flawed; and be-

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[44] It is worth noting, of course, that the "value" affirmative defense in Section 29A also poses difficulties conceptually, for how can one know in advance whether a photo will have scientific or other value? At least in the context of *producing* child pornography, *Amici* support statutory language that defines conduct not tied to *post hoc* "lewdness" or "value" assessments. Simply because Section 29A already has one such anomaly, however, does not mean the Constitution requires it to have two.

[45] The maze of prepositional phrases makes the first sentence of Section 29A less than elegantly clear, and it is quite impossible to determine what the word "posture" represents in the second paragraph.

cause the second of them can only be performed by a state court, it is impossible for this Court to fill in the blanks.

### A. *No Basis Exists for Believing the Challenged Act Will Have Any Substantial Impact on Protected Speech.*

Because of the close similarity between the challenged law and the *Ferber* criteria, 458 U.S. at 764-766, and because of the vast extent of child sexual abuse against which it may clearly be used, Respondent cannot assert, in his "overbreadth" claim, that the law "could never be applied in a valid manner." *See City Council* v. *Taxpayers for Vincent,* 466 U.S. 789, 798 (1984). He is thus relegated to showing that it "nevertheless is so broad that it 'may inhibit the constitutionally protected speech of third parties.'" *New York State Club Assn., Inc.,* v. *City of New York,* No. 86-1836, slip op. at 8 (U.S. June 20, 1988) (quoting *Taxpayers for Vincent, supra,* 466 U.S. at 798). Under that latter test, however, particularly as explicated in *Ferber* and *New York State Club Assn., supra,* his claim is equally unfounded.

A wide range of sexually exploitative conduct, to begin with, is legitimately within Section 29's reach under the clear holding of *Ferber*—that is, all solicitation of children for sexually explicit photographs except, arguably, those involving "mere" nudity. 458 U.S. at 764-766. But how much speech does "mere" nudity represent, and what is the likelihood it will be inhibited by the statute? Like the unsuccessful appellant in *New York State Club Assn., supra,* slip op. at 11, Respondent has created no record identifying the third parties likely to be affected, offering only speculation that some parents will not photograph their children and that some movie makers will fear to shoot "Blue Lagoon." Resp. Br. in Opp. 6. Yet no one seriously doubted in *New York State Club Assn.* that some private clubs would "fall within the potential reach"



of the law and yet still be "deserving of constitutional protection." *Id.,* slip op. at 2 (O'Connor, J., concurring). And no member of the Court in *Ferber* believed the child pornography statute there to be free from potentially troubling applications. 458 U.S. at 773. What those cases have in common with this one is that no basis in the record exists for believing that those applications will occupy more than a tiny fraction of the law's ambit. No prosecution has been launched or has been threatened against any of the conduct conjured up by Respondent. In such circumstances the common-sense teaching of the cases is that "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which [the law's] sanctions, assertedly, may not be applied." *Broadrick* v. *Oklahoma,* 413 U.S. 601, 615-616 (1973). This is especially true here, where in contrast with the "pure speech" scenario of *Ferber,* 458 U.S. at 771, the focus of the law is clearly on "conduct"—which even if arguably "expressive" clearly "falls within the scope of otherwise valid criminal laws that reflect legitimate state interests." *Broadrick, supra,* 413 U.S. at 616.

### B. *The Lower Court Misapplied the "Overbreadth" Doctrine by Failing to Attempt to Find a Narrowing Construction of the Statute.*

A conceptual twin of the "substantiality" prong of "overbreadth" doctrine is even more to the point: "Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute." *Broadrick, supra,* 413 U.S. at 613. Only when it is patently clear no such construction is possible, *see, e.g., Gooding* v. *Wilson,* 405 U.S. 518 (1972), is it appropriate for federal courts to invalidate an entire statute for "overbreadth." *Ferber, supra,* 458 U.S. at 769n.24.

Yet as *Ferber* also taught, state courts should not "err on the side of an overly broad reading of [the Court's]

doctrines and precedents" and "entertain an overbreadth when not required to do so by the Constitution." *Id.* at 767. The construction of state statutes by state courts will always be considered authoritative by federal courts, *Wainwright* v. *Stone,* 414 U.S. 21, 22-23 (1973); yet it seems implicit in the analysis of *Broadrick* and *Ferber* that it is improper for a state court to confront a federal constitutional challenge and *fail* to construe the statute altogether in light of federal "overbreadth" principles.

That is what, remarkably, happened in this case. The majority below made no attempt to parse the language of Section 29A to see if it could be saved by a limiting construction of the phrase "state of nudity." Without even a nod toward standard construction techniques the majority simply declared the law overbroad and void *in toto.* 518 N.E.2d at 838. Thus, as the dissenters pointed out, the majority failed even to consider the simple possibility of severing the offending language on nudity, leaving the plainly valid remainder of the statute intact. *Id.* at 841n.4. Further, the lower court ignored its own longstanding rule that "[w]here possible, we construe statutes in such a way that they are constitutional." *Commonwealth* v. *King,* 372 N.E. 2d 196, 203 (Mass. 1977) (construing state prostitution statute to avoid overbreadth problems).[46] In sharp contrast, the New York Court of Appeals in *Ferber* carefully analyzed the statute at issue there to see if it could be limited in scope, 52 N.Y.2d 674, 422 N.E.2d 523 (1981)—a fact twice noted by this Court in its opinion. 458 U.S. 752, 769n.24. *See also, Gooding* v. *Wilson, supra,* 405 U.S. at 524-528 (detailing various

[46] The failure of the lower court to attempt a saving construction of Section 29A is particularly inexplicable in view of its previous willingness to narrow the state's obscenity statute to meet constitutional objections. *Commonwealth* v. *707 Main Corp.,* 357 N.E.2d 753, 759 (Mass. 1976). *See United States* v. *12 200-Ft. Reels,* 413 U.S. 123, 130n.7 (1972) (narrowing federal obscenity statute to eliminate obsolete language).



state court constructions of challenged statute before entertaining facial attack).

What is particularly puzzling about the approach of the majority below is that the structure and history of the challenged statute would seem easily to support a narrower construction of Section 29A. Thus definition of the phrase "state of nudity," which so troubled the majority, is preceded by the statement in Section 31 of Mass. Gen. Laws Ann. ch. 272 (West 1980) that it will apply "*unless the context requires otherwise.*" (Emphasis added.) Clearly, then, the legislature did not insist on an inflexible, literalist reading of the definition of "state of nudity"; surely, too, the "context" of the First Amendment as interpreted by the majority would seem to support the sort of constitutionally required narrowing construction Massachusetts courts have frequently used before.[47] That is all the more compelling because Section 29A was, after all, enacted in its present form less than a month after *Ferber* was decided;[48] if anything it appears to have been approved in eagerness to *comply* with that decision rather than to flout it.

When a state court has manifestly failed to resolve an issue of state law crucial to determining a federal constitutional issue, this Court has not hesitated to require reexamination below. *Employment Division, Dep't of Human Resources of Oregon* v. *Smith,* —— U.S. ——, 99 L.Ed.2d 753, 766 (1988); *Hicks* v. *Feiock,* —— U.S. ——, 99 L.Ed. 2d 721, 735-737 (1988). In the context of "overbreadth" analysis, where facial invalidation is supposed to be an

[47] The words "pose" and "be exhibited" in Section 29A might, too, be properly construed to have a somewhat restricted meaning; it is important to note they are used *only* in connection with nude photography, not sexual conduct. Thus unstaged photography in the home, where no child is being asked to "pose" nor is being "exhibited" publicly, might well be excluded from Section 29A's reach after careful review on remand.

[48] See text to note 10, *supra.*

absolute last resort, a state court must at least explain, as did the New York Court of Appeals in *Ferber,* why no narrower construction of the statute is possible. Otherwise such court will be exercising federal power to frustrate a legislative mandate in a manner no federal court would undertake to do.

*Ferber* recognized this as an untenable result, 458 U.S. at 767, but its teaching was lost on the court below. If the existence of some threatened First Amendment interests compel a facial "overbreadth" review of Section 29A, that review should be conducted only after the Massachusetts Supreme Judicial Court has clarified why a narrower construction of the law—*e.g.*, one giving a restricted definition to the words "pose" and "be exhibited" [49]—is not possible. Thus even if First Amendment interests are implicated in this case, and even if Section 29A may "substantially" infringe upon them—both propositions which *Amici,* of course, deny—the decision of the court below still cannot stand without a good-faith effort to find a narrowing construction.

## CONCLUSION

> "Dear me!" said Nicholas, "it's extraordinary."
>
> It was, for the infant phenomenon, though of short stature, had a comparatively aged countenance, and had moreover been precisely the same age . . . for five good years. But she had been kept up late every night, and put on an allowance of gin-and-water from infancy, to prevent her growing tall, and perhaps this system of training had produced in the infant phenomenon these additional phenomena.[50]

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[49] *See* note 47, *supra.*

[50] C. Dickens, *Nicholas Nickleby* 365 (Penguin ed. 1981) (1st ed. London 1838-1839).



Thus did Charles Dickens affectionately introduce Miss Ninetta Crummles, the "infant phenomenon," condemned in *Nicholas Nickleby* to be forever young, forever famous, and forever untalented. Dickens was, characteristically, far ahead of his time in seeing the misuse of a child in what seemed to others an innocent indulgence of adult power. That other children of the era were exploited in even worse ways[51] did not blind Dickens to the dangers facing children performing for the pleasure of their elders.

Nor should the continued production and distribution of the most extreme kinds of child pornography blind us to what is at stake in this case: the entirely reasonable attempt of Massachusetts to protect children from solicitations that are overwhelmingly part of a process of sexual seduction and coercion, and that are highly destructive of privacy and normal development. The First Amendment should not be available as a shield for child abuse, and its greatest corollary, the "overbreadth" doctrine, should not be invoked lightly. Asking a child to undress for a photograph is conduct that might, in some circumstances, be morally defensible, but it is not part of the "breathing space" of the First Amendment. *Broadrick, supra,* 413 U.S. at 611.[52]

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[51] Thus compare the phenomenon's father, the lovable Mr. Vincent Crummles, with the odious Wackford Squeers.

[52] *See* Schauer *Codifying the First Amendment: New York* v. *Ferber,* 1982 Sup. Ct. Rev. 285, 289, 299-302 (1983); Schauer, *supra* note 39, at 927 ("The issue is not whether the activity has social value, but whether it is speech." *Id*).

The judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts should be reversed.

Respectfully submitted,

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